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SUPREME COURT, U.S.

No. 617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WALTER R. HEARNE and STANLEY E. WHITMAN,

Appellants,

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR IDAHO, SOUTHERN DIVISION.

JURISDICTIONAL STATEMENT

HERMAN J. McDEVITT,
McDEVITT & McDEVITT,
First Security Bank Building,
Pocatello, Idaho,
Attorney for Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR IDAHO, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the three judge district court denominated "Order Staying Proceedings" on the merits and on all pending motions has not been reported and is attached as Appendix A.

Jurisdiction

On January 10, 1964, the three-judge statutory court entered an order and judgment dismissing the complaint and supplemental complaint and a first notice of appeal to this Court was filed in the district court on Febrary 10, 1964. This Court reversed and remanded for further proceedings in conformance with *Reynolds vs. Sims, et al*, U.S. 12 L. Ed. 2d 506 on June 22, 1964. The three-judge statutory court on July 28, 1964, entered its Order Staying Proceedings, refusing to make a decision on the merits or on pending motions, and refusing to consider any further proceedings in the matter. The present Notice of Appeal was filed August 26, 1964. Jurisdiction of this Court to review on direct appeal the decision of the district court refusing to comply with this Court's remand, refusing to grant the injunction requested by Plaintiff's Motion After Notice and Hearing, and refusing to consider any further proceedings in the matter, is conferred by 28 U.S.C. 1253.

United States Constitution, Federal Statutes and State Constitution and Statutes Involved

The pertinent provisions of the United States Constitution; 42 U.S.C. Sections 1983 and 1988; 28 U.S.C., Sections 1343 (3), 2201 and 2202; the Constitution of Idaho, Art. III, Sections 1, 2, 4 and 5, Art. XX, Sections 1, 3 and 4; 1911 House Joint Resolution 13; and Idaho State Law, Sections 34-1801, 67-202 and 67-203, as amended since 1917, are set forth in Appendix B, *infra*, pp. 1b-11b.

Question Presented

The legislative apportionment of the State of Idaho is based upon the formula contained in the State Constitution and in the Statutes. Application of the combined formula results, and must necessarily result, in gross disproportion between the population and representation in both houses of the legislature. The Plaintiffs established, and defendants admitted, (a) that a representative from the most populous county represents 15.7 times as many citizens as the representative from the least populous county, and that the senator from the most populous county represents 100 times as many citizens as the senator from the least populous county, and (b) that the 1963 apportionment formula for the house of representatives allows one representative without full ratio up to 5,000 persons, and one additional representative for each full ratio

of 10,000 persons thereafter. Plaintiffs also established that there was no rational relationship between the apportionment in either the House or the Senate, and the geographic size or location of the county represented. Plaintiffs offered to prove that the 1911 amendment to the Idaho Constitution, by which each county was guaranteed one senator and one representative regardless of population, was invalidly adopted under the Idaho Constitution and decisions, and that the apportionment formulas adopted since 1911 had been specifically intended to limit the representation of the more populous counties without any basis in reason. After hearing the remand from the United States Supreme Court, and on the motions of the Defendant Governor of the State of Idaho, and the Plaintiffs, both praying, among other things, for a decision declaring the constitutionality or unconstitutionality of the various statutory and constitutional provisions on legislative apportionment in order that the legislature might be guided in its actions, and with no motions before the Court praying for a stay of proceedings, the district court refused to declare the applicable law as to the constitutional and statutory provisions of the state, and stayed all proceedings without relationship to any action of the legislature until thirty (30) days after the session.

The questions presented are:

1. Whether the district court erred under the June 22, 1964 opinion, of the United States Supreme Court,

in failing and refusing to give declaratory judgment interpreting the provisions of the constitution and statutes of the State of Idaho to any extent that they may be in conflict with the Fourteenth Amendment of the Constitution of the United States consistent with the views expressed in *Reynolds v. Sims*, U.S. 12 L. Ed. 2d 506, and other cases related to legislative apportionment decided therewith.

2. Whether the district court erred in failing and refusing to declare any invalidity of the Idaho Constitution and statutes insofar as they may be in conflict with the Fourteenth Amendment of the United States Constitution under the hereinabove referred to decision of the United States Supreme Court, thus requiring the Idaho legislature to remain bound by the portion of the said laws and constitution creating invalid apportionment in Idaho and in effect preventing the Idaho legislature, if it so desired, to enact apportionment as required by the Constitution of the United States.

3. Whether the district court erred in failing and refusing to make any decision on the motions of the plaintiffs and defendant Governor of the state of Idaho, for declaratory relief, and refusing to make any decision on the complaint and supplemental complaint, by staying all further proceedings wholly unrelated to whether or not the Idaho legislature might take any action for reapportionment for a period of thirty days after the adjournment of the regular session, which commences in January, 1965, or until further order

of the court, when there was no motion or request before the court by any party thereto for such stay.

4. Whether the District Court erred in failing and refusing to take any action declaring any portion of the Idaho constitution and statutes on reapportionment invalid as in conflict with the Fourteenth Amendment of the Constitution of the United States, and allowing until thirty days after the next regular session of the Idaho legislature, in view of the fact that the Governor of the State of Idaho had called a special session of the Idaho legislature to convene five days after the hearing before the district court, which legislative session was meeting under the 1951 apportionment act, and was not required by the call of such special session to act on reapportionment.

5. Whether the district court erred in failing and refusing under the above noted decision of the United States Supreme Court on remand to set forth standards or guidelines to be used by the Idaho legislature for enactment of a valid plan of apportionment in Idaho, or to adopt in its decision the mandate of this Court that the matter be decided in accordance with the decision in *Reynolds v. Sims, supra*, and related cases, thereby leaving the state legislature unguided by any order of the Court, and in fact bound by the present constitutional provisions which in themselves are mainly responsible for malapportionment in Idaho.

6. Whether the district court erred in expressly deciding that: ". . . further proceedings in conformity

with the opinion of the Supreme Court . . ." would not be possible at this time without seriously disrupting the election machinery of Idaho because of the imminence of the primary election on August 4 and the general election on November 3, 1964, based on an alleged disenfranchisement or diluting of the franchise of more persons than are presently deprived of such franchise by existing legislative apportionment, in the absence of existing pleadings or motions requesting such stay, and in the absence of any evidence submitted either at the earlier hearing in 1963, or at the time of the hearing in July, 1964, supporting any grounds for stay.

7. Whether the district court erred in failing and refusing to decide whether the 1911 Amendment to Article III, Section 2 of the Idaho Constitution, was validly adopted and failing and refusing to interpret the same if so validly adopted, and thereby failing to determine whether one senator and one representative must be elected from each county in Idaho, regardless of population, and effectively prohibiting the Idaho legislature from enacting any statutes which would establish constitutional apportionment plans, but be in contravention of uninterpreted constitutional provisions.

Statement

A) The Complaint and Supplemental Complaint

This action was brought by the complaint filed Octo-

ber 31, 1962, and the supplemental complaint filed April 12, 1963, in the District Court for Idaho, Southern Division, under the Civil Rights Act, U.S.C. Title 42, §§1983 and 1988, and under U.S.C. Title 28, §1343. The appellants are citizens and voters residing respectively in the counties of Bannock and Ada. The suit is a class action brought on behalf of the named appellants and all other persons, citizens, taxpayers and qualified voters similarly situated.

The appellees are: the Governor, the Secretary of State, the Attorney General, the Auditor, and the Treasurer of the State of Idaho; and the other appellees are the three county commissioners and the auditor each of Ada and Bannock counties. The complaints alleged that all of the appellees perform official functions arising out of the legislative apportionment of the state and the conduct of elections pursuant to such apportionment.

The complaints alleged that the appellants are denied due process and equal protection of the law as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States, by virtue of the provisions of the Idaho Constitution and the statutes in implementation thereof which provide for an apportionment of the State Senate and House of Representatives in a manner which is discriminatory to the residents of the more populous areas of the state.

The allegations of the complaint substantially parallel those of WMCA vs. Simon, 370 U.S. 190.

The complaint as supplemented contained three causes of action, the first of which alleged that the formula contained in the State constitution (Art. III, §§1, 2, 4 and 5) and statutes (Sections 67-202 and 203) currently results in an apportionment which deprives appellants of rights guaranteed by the Fourteenth Amendment. The second cause of action alleged that those provisions of the state constitution and statutes, together with the 1911 amendment (H.J.R. 13, 1911 S.L.) and various prior apportionment statutes from 1917 to 1963, were invalid and violative of the Fourteenth Amendment at the time of their adoption and constituted over the period a continuing systematic device to perpetuate majority control of both legislative houses by a minority of residents of Idaho, which constituted "affirmative legislative action" depriving appellants of rights guaranteed by the Fourteenth Amendment. The third cause of action alleged that those provisions of the state constitution and statutes currently resulted in an apportioned legislature which has chronically and systematically enacted laws grossly discriminatory against the residents of the more populous areas in economic, taxation and regulatory matters which deprive said persons of property without due process of law.

As examples of the result of the apportionment formula, the admitted facts establish that 17% of the population elects a majority of the senate with a range of one senator representing at the least 915 persons

to at the greatest 93,460 persons. In the house a representative represents 915 persons at the least to at the greatest 14,394 persons, under a formula which allows one representative without full ratio up to 5,000 persons, and one additional representative for each full ratio of 10,000 persons thereafter.

The relief sought by the complaints was that the district court declare, pursuant to 28 U.S.C. 2201, that Article III, §§ 2, 4 and 5, of the Constitution of Idaho, and Idaho Laws 67-202 and 67-203 are void and invalid under the Fourteenth Amendment of the Constitution of the United States; that the appellees be restrained from acting pursuant to said provisions, and that the court retain jurisdiction of the case until the state legislature provides for such apportionment of the state as would insure to appellants the rights guaranteed them by the Fourteenth Amendment.

B) The Prior Proceedings

The district court heard the cause on November 18 and 19, 1963, at which hearing it rejected as irrelevant appellants' offers to prove that: (a) the apportionment formula was specifically designed and intended to curtail the representation of residents of the more heavily populated areas of the state; and (b) that the malapportioned legislature in fact discriminated against such residents in levying taxes, allocating revenues, public

utility regulation and exercise of police powers. Under these exclusionary rulings of the court, appellants were permitted only to introduce, and did introduce, evidence of the existing apportionment and the apportionment which must necessarily result when the mandatory formula contained in the state constitution and laws is applied to the 1960 citizen census figures. The appellee county commissioners joined with appellants in asking the court for relief. No appellee called any witnesses, nor offered any evidence to justify or rationalize the gross disparities which exist in both senate and house between population and representation; some facts were stipulated or admitted.

On appeal from the decision of January 10, 1964, this court entered its reversal and remand on June 22, 1964, U.S. .On July 2, 1964, defendant Robert E. Smylie, Governor of the State of Idaho, filed his motion below requesting determination of the case on the merits in order that the provisions of the Idaho Constitution and statutes preventing compliance with *Reynolds v. Sims, supra*, and other cases, might be judicially determined and the legislature empowered to validly reapportion. On July 14, 1964, plaintiffs moved, among other things, for a decision on the merits and for an injunction of the imminent special session of the

legislature and any regular legislative session for any other purpose except reapportionment. All motions were heard by the court below on July 24, 1964, and on said day plaintiffs also filed their motion requesting immediate decision on the earlier Motion for Temporary Restraining Order and Injunction. The court on July 28, 1964, entered the order appealed from herein.

C) The Opinion Below

Confronted with the remand of this court directing further proceedings on the merits, and with the motions of plaintiffs and the defendant Governor for an immediate decision on the merits, the court below heard argument on these matters July 24, 1964. No party filed motions requesting any delay or stay of proceedings, and no evidence was presented to that end.

On this record, the three-judge District Court, *sua sponte*, entered its stay order reciting facts and conclusions not contended for by any party or based on any evidence before the court.

This terse order, set forth in Appendix A herein, relegates plaintiffs to the position from which they originally appealed to this court. That appeal was based on the refusal of the lower court to decide the case on the merits. Jurisdictional Statement, *Hearne et al v. Smylie et al*, October Term, 1963, No. 1075.

Under the terms of the stay order appealed from

herein, the lower court, by indefinite postponement of all proceedings in the case, has reinstated its former decision and persists in its refusal to comply with the remand of this court.

In this context, it should be noted that the order appealed from does not order reapportionment, in fact prevents it, and leaves to the malapportioned legislature complete control of when further proceedings may be had in this case.

The Question is Substantial

The question presented is substantial because the Complaints and Motions upon which all proceedings have been stayed raise issues identical or substantially identical to those presented to this Honorable Court in *Reynolds vs. Sims*, 12 L ed. 2d 506, and the other reapportionment cases decided therewith. In this instance the three judge court below has failed to follow the requirement of *Baker vs. Carr*, 369 U.S. 237, holding that such Complaint presents "a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision," and the lower three-judge court has also, by the issuance of its order, indefinitely staying all proceedings, raised the question of the appropriateness and justification for denial of relief under the remand herein, and *Reynolds vs. Sims*, *supra*. As therein stated,

> "It is enough to say now that, once a state's legislative apportionment scheme is found to be uncon-

stitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."

This Court has long recognized that once the deprivation of constitutional rights has been called to the attention of a federal court, the constitutional wrong should be immediately dealt with. *Brown vs. Board of Education*, 347 U.S. 483, 89 L ed. 873; *Gray vs. Saunders*, 372 U.S. 368, 9 L ed. 2d 821; *Watson vs. Memphis*, 373 U.S. 526, 10 L ed. 529. This Court has held any delay in giving relief is a significant departure from the ". . . usual principle that any deprivation of constitutional rights calls for prompt rectification." *Watson vs. Memphis*, 373 U.S. 534.

> "The basic guaranties of our constitution are warrants for the here and now, and unless there is an overwhelming, compelling reason, they are to be promptly fulfilled."
> (footnote 5, *Watson vs. Memphis*, 373 U.S. 533)

The earlier decision on the merits in this case, reported in 225 Fed Supp 645, was reversed and a remand for proceedings in conformance with *Reynolds vs. Sims*, *supra*, issued on June 20, 1964, in this matter. The earlier decision reversed held that the Plaintiffs were entitled to no relief by way of a declaratory judgment that the apportionment of the State of Idaho was improper, and entitled to no injunctive relief because there was no showing of irreparable injury. The Court

below has not proceeded in accordance with the remand of this Honorable Court by deciding the issue, and determining what relief should be granted, whether or not it may grant delay having made such decision. This stay on the frivolous grounds that any decision on the merits would interfere with the legislative and elective processes of the State of Idaho raises the substantial question of whether a lower court can deprive Plaintiffs, who have, on the face of their Complaint, stated a valid cause of action of malapportionment under *Reynolds vs. Sims*, *supra*, of any relief by merely staying all decision in the case and on any pending motions until such future date as the court or the malapportioned legislature may determine.

The lower court had a duty to follow the terms of this court's reversal and remand, based on the admitted facts. These admitted facts show that a house representative from the County with the largest number of persons per representative represents 15.7 times as many citizens as the house representative from the least populous county, and that a senator from the most populous county represents 100 times as many citizens as the senator from the least populous county. The admitted facts also show the 1963 apportionment formula for the house allows one representative without full ratio up to 5,000 persons, and additional representatives for each full ratio of 10,000 persons thereafter. The evidence clearly shows no rational relationship between such formulas and either the geographical

size or location of the particular county units. In *Reynolds vs. Sims, supra,* and the other apportionment cases decided therewith in the 1963 term, the discrimination in each such case was less than that of Idaho. Certainly, the Idaho Senate, where it is admitted that a majority is elected by 17% of the population is *per se* invidiously discriminatory. Under these facts the reversal and remand was not a directive for further proceedings such as a new trial, but in effect leaves the lower court with the case procedurally before it under Rule 52 of the Federal Rules of Civil Procedure, requiring findings and conclusions, and the entry of a judgment pursuant to Rule 58. The three-man District Court was bound by the reversal and remand of this Court with, in effect, directions to enter judgment in accordance with the view expressed in the specific opinions referred to. *Roth vs. Kaptowski*, 76 N.E. 2d 786, 7 ALR 2d 674; *Mutual Orange Distributors vs. Agricultural Prorate Commission of California*, 30 Fed Sup 937 (DC Cal.). The remand settled the law, leaving the court only the application of such law to its particular facts. *Stonega Coke & Coal vs. Price*, 116 Fed 2d 18 (CCA W.Va.) This matter thus falls within the well established rule that a lower court under a remand with explicit direction is without power to do anything else but to carry out such direction. *Hampton vs. Superior Court of Los Angeles County*, 242 P. 2d 138, Cal. 2d 652; *Taylor vs. Interstate Motor Freight System*, 150 NYS 2d 84; *Braun vs. Taub*, 171 Fed 2d 649 (CCA N.Y.) cert denied 69 Sup Ct. 1156, 193 L ed.

1725. Both the Plaintiffs and the Defendant Governor of the State of Idaho moved for an immediate decision after the June 22, 1964 reversal and remand, because of the primary election on August 4th and the general election on November 3, 1964. The Court has not acted on such motions, nor on the reversal and remand of this Honorable Court. There is thus presented the substantial question whether strict compliance with an appellate court's reversal and remand lies at the heart of our judicial system and is inherently a matter of fundamental substance.

In addition, a substantial question is presented, because following the reversal and remand in this case, the Governor of the State of Idaho called a Special Session of the legislature elected under the 1951 apportionment act to convene on the 29th day of July, 1964, to consider four major issues, but not calling the legislature to consider any action to reapportion itself. The motions of Plaintiffs for temporary injunction against such session pending decision raises the substantial question concerning how long a malapportioned legislature may continue to meet in special or other sessions after a reversal and remand such as occurred herein, before a local three-man District Court must act to protect the constitutional rights of the Plaintiffs. In addition, at the time of the hearing on the special motions for a decision by the Defendant Governor and the Plaintiffs, and the Plaintiff's motion for an injunction pendente lite, no defendant or any

third party moved for a stay of proceedings in the lower court. Thus, despite the fact that the admitted evidence in this action as applied to the law set forth in *Reynolds vs. Sims, supra*, and the other reapportionment cases, clearly showed an irreparable injury of a constitutional nature occurring to the Plaintiffs, the lower three-judge district court suspended the Constitutional rights of these Plaintiffs until some fortuitous time in the future when a decision may be rendered. Despite the citations by these Plaintiffs to the lower court of the cases delineating the circumstances under which a delay may be allowed once it appears that a constitutional right has been infringed, as cited above, and the specific holding of *Watson vs. Memphis, supra*, that "delay . . . cannot be upheld except upon the most convincing and impressing demonstration . . ." and that persons so claiming ". . . must sustain an extremely heavy burden of proof," 373 U.S. 533, an indefinite delay is allowed without any evidence or motion on the part of any of the defendants asking or supporting the same. See also *Sawyer vs. City of Mobile*, 208 Fed Sup 548; *McCain vs. Davis*, 217 Fed Sup 661, and *Orleans Parrish School Board vs. Bush*, 242 Fed 2d 156. Recalling again that the special session involved a house of representatives elected under a 1951 apportionment law which was approximately 30% less representative than the 1963 apportionment law and the fact that the special session was not called for the purpose of reapportionment, but involved amendments to the Idaho constitution on other matters (see

affidavits attached to Plaintiff's motion for temporary injunction), there is a substantial question raised of the wisdom of the lower court in not only refusing to grant the temporary injunction but even in the end refusing to decide on the merits whether the Idaho laws and statutes are constitutional.

A substantial question is further presented as to whether the lower three-judge district court can refuse for a second time to issue a judgment of declaration of constitutionality of the statutes and Constitution of the State of Idaho relating to apportionment, when the failure to at least declare the status of such constitution and statutory provisions leaves the legislature bound by them. The apportionment of the Senate is entirely governed by provisions in the Idaho Constitution, and the requirement of at least one representative per county for the House of Rpresentativs is also in the Idaho Constitution. How can any future legislature enact a new apportionment plan when no decision has been rendered by the lower court that the present plan does not meet the standards of equal protection of the law required by the 14th amendment? The argument that the Idaho legislature may adopt constitutional amendments to be submitted to the people at the next general election in November, 1966, and which would be effective for legislative apportionment for the election held in November of 1968, ignores the fact that there is no certainty that the legislature need even consider a constitutional amendment when the

lower court has not held anything unconstitutional. Secondly, justice so long delayed is justice denied. Due to such delay, the election of the legislature in November of 1964 and the meeting of the regular session in January of 1965 under the present malapportioned representation without the lower court rendering any decision on the merits in this matter, demonstrates the arbitrary and willful abuse of discretion of the lower court in refusing to act to protect the constitutional rights of the Plaintiffs and in failing to obey the remand of this Court. Considering the fact that the lower court acted on its own motion in granting a stay order, even over the motion of the Defendant Governor, who must know what the law is in order to make a proper submission of apportionment plans to the regular session of the legislature, it is apparent that the lower three judge district court has placed itself in disobedience to the reversal and remand of this Honorable Court.

As pointed out in the jurisdictional statement filed before this Court in the October term, 1963, and the earlier appeal in this matter, Case No. 1075, there is no initiative to amend the Idaho Constitution, a constitutional amendment and a constitutional convention to amend the constitution both requiring a two-thirds vote of both houses of the legislature. The minority control of the house and substantial minority control of the senate clearly indicates that no such two-thirds vote can be obtained for either purpose. The

Idaho Supreme Court has held that the Idaho Constitution, ". . . destroys any possibility of representation based solely on a per capita or per voter basis . . ." and that ". . . disparity of representation stems from the constitution." *Caesar vs. Williams*, 371 P. 2d 241, 248-9. The futility of referring appellants to a political remedy is obvious where the very evil complained of in this action renders that political remedy ineffective. Since any relief from the malapportionment of the Idaho Senate and House is prevented by the express provisions of the Idaho Constitution, the refusal of the court below to render a declaratory judgment on the constitutionality of these provisions is to provide the majority of the representatives and senators elected by a minority of the people with little reason and certainly no incentive to try to decide on a new apportionment system for the State of Idaho. As reported on July 18, 1964, in the Idaho Daily Statesman, 16 senators from the greatly over-represented counties met and issued a joint statement to the effect that the decision in *Reynolds vs. Sims, supra*, and the other reapportionment cases, . . . "has amended the constitution of the United States and the State of Idaho by judicial fiat, and the net effect in Idaho is to grant complete legislative control of all of the state to the hands of 5 or 6 counties." And the same issue reported that such senators were "hopping mad" and that ". . . they would like to find a way to circumvent the court's ruling." Without an order of the lower court, declaring the constitutionality of the provisions of the con-

stitution and the statutes of the State of Idaho, there can be little doubt that the legislature is not going to take any action.

A substantial question is also tendered to this Court in the wording of the stay order issued by the three-judge district court. The stay on all proceedings, which must include both the Complaint, the supplemental Complaint, the motions for immediate decision, the motion for a temporary injunction, and any future motions, are stayed until 30 days after the adjournment of the 1965 legislature. When the 1965 legislature will adjourn is only a matter of conjecture, and such adjournment could be continued until the end of the two-year terms for which the legislators are elected. Perhaps the legislature could recess for two years. It is not a question, as was presented in *Reynolds vs. Sims, supra*, of whether or not the next election should be held under a constitutional apportionment plan, but a question of how many legislatures the Plaintiffs must suffer through under the present malapportioned system before the lower three-judge court decides that it should issue a declaratory judgment and such relief as it may believe appropriate, under the pleadings of the parties. While in the first decision of this case by the three-judge district court, it avoided decision on the merits by refusing to exercise its discretion under the declaratory judgment act, finding that it was impossible to fashion any effective equitable relief, the same court now refuses to act on the grounds it might

interfere with the regular elective process and the legislative process of the state of Idaho if it enters any decision in this case. This is merely a new guise for the nullification of the constitutional rights which appellants seek to enforce by this action. Again, it is to this Honorable Court which appellant must now look as the sole possible source of redress for the deprivation of rights so fundamental to a democratic society.

CONCLUSION

It is submitted that the Court has jurisdiction and should hear this appeal, or, in its discretion, without briefs and oral argument, should summarily reverse the decision below, and remand the case for a decision on the merits.

Respectfully submitted,

McDEVITT AND McDEVITT

By: .....
Attorneys for Appellant
Pocatello, Idaho

October 21, 1964

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO SOUTHERN DIVISION

Civil No. 3815

WALTER R. HEARNE and
STANLEY E. WHITMAN,

Plaintiffs,

v.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of Ada County, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL L. GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

Defendants.

ORDER STAYING PROCEEDINGS

The Mandate of the United States Supreme Court having been received on July 20, 1964; and it appearing to the court:

(1) That Idaho's primary election is to be held on August 4, 1964, and therefore "an impending election is imminent and . . . [the] State's election machinery is already in progress" [*Reynolds etc, et al v. Sims et al,* U.S. ; 32 Law Week 4535, 4550 (6-15-'64)];

(2) That it would not be possible at this time to take further proceedings in conformity with the opinion of the Supreme Court, which would not be reasonably certain to disrupt seriously the election machinery established for the August 4th primary election and the forthcoming general election in November, and thus disenfranchise, or dilute the franchise, of far more persons than would reasonably be expected to result from continuing the existing legislative apportionment system until after the next session of the Idaho Legislature in January of 1965; Accordingly

IT IS ORDERED That decision on all pending motions is reserved, and all further proceedings in this action are hereby stayed, until the expiration of the period of thirty (30) days next following adjournment of the next regular session of the Legislature of

the State of Idaho in January of 1965, or until further order of Court.

Filed July 28, 1964.

United States Circuit Judge

United States District Judge

United States District Judge

APPENDIX B

UNITED STATES CONSTITUTION, FEDERAL STATUTES AND STATE CONSTITUTIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION:

Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.***

FEDERAL STATUTES:

U.S.C., Title 42, Sections 1983 and 1988:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1988. Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

U.S.C., Title 28, Section 1343, (3):

§ 1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:***

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all

persons within the jurisdiction of the United States;

The Federal Declaratory Judgment Act

U.S.C., Title 28, Sections 2201 and 2202:

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

THE CONSTITUTION OF THE STATE OF IDAHO

ARTICLE III—LEGISLATIVE DEPARTMENT

§ 1. Legislative power—Enacting clause—Referendum—Initiative.—The legislative power of the state shall be vested in a senate and house of representatives. The enacting clause of every bill shall be as follows: "Be it enacted by the Legislature of the State of Idaho."

The people reserve to themselves the power to ap-

prove or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.

The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection provided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of governor at such general election to be adopted.

Membership of house and senate.—The senate shall consist of one (1) member from each county. The legislature may fix the number of members of the house of representatives at not more than three (3) times as many representatives as there are senators. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law.

As originally adopted, Article III, Section 2 of the

Constitution of the State of Idaho provided as follows:

§ 2. The senate shall consist of eighteen members and the house of representatives of thirty-six members. The legislature may increase the number of senators and representatives: provided, the number of senators shall never exceed twenty-four, and the house of representatives shall never exceed sixty members. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may from time to time be divided by law.

House Joint Resolution No. 13, proposing the 1911 amendment to the Idaho Constitution provided as follows:

SECTION 1. That Section 2 of Article III of the Constitution of the State of Idaho be amended to read as follows:

'Sec. 2. The Senate shall consist of one member from each county of the state now created or hereafter to be created and the House of Representatives shall consist of not to exceed three times the number of Senators. The Senators shall be chosen by the electors of the respective counties and the Representatives shall be chosen by electors of the respective counties or districts into which the state may from time to time be divided by law.'

"SECTION 2. The question to be submitted to the electors of the State of Idaho at the next general election shall be as follows, to-wit:

" 'Shall Section 2 of Article III of the Constitution of the State of Idaho, be amended so as to provide that the Senate shall consist of one member from each of the counties of the state now created or which may hereafter be created, and the House of Representatives consist of not to exceed three times the number of Senators?'

§ 4. Apportionment of legislature.—The members of the first legislature shall be apportioned to the several legislative districts of the state in proportion to the number of votes polled at the last general election for delegate to congress, and thereafter to be apportioned as may be provided by law: provided, each county shall be entitled to one representative.

§ 5. Senatorial and representative districts. — A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating such districts.

ARTICLE XX—AMENDMENTS

§ 1. How amendments may be proposed. — Any amendment or amendments to this Constitution may be proposed in either branch of the legislature, and if the same shall be agreed to by two-thirds of all the members of each of the two houses, voting separately, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and it shall be the duty of the legislature to submit

such amendment or amendments to the electors of the state at the next general election, and cause the same to be published without delay for at least six consecutive weeks, prior to said election, in not less than one newspaper of general circulation published in each county; and if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.

§ 3. Revision or amendment by convention. — Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote at the next general election, for or against a convention, and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session provide by law for calling the same; and such convention shall consist of a number of members, not less than double the number of the most numerous branch of the legislature.

§ 4. Submission of revised constitution to people. —Any Constitution adopted by such convention, shall have no validity until it has been submitted to, and adopted by, the people.

STATE STATUTES: IDAHO CODE SECTION 34-1801:

34-1801. Petition. — The following shall be sub-

stantially the form of petition for any law proposed by the initiative:

WARNING

It is a felony for any one to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the measure, or to sign such petition when he is not a legal voter.

INITIATIVE PETITION

To the Honorable . . . . . , Secretary of State of the State of Idaho: We, the undersigned citizens and legal voters of the State of Idaho, respectfully demand that the following proposed law, to-wit: (setting out full text of the measure proposed) shall be submitted to the legal voters of the State of Idaho, for their approval or rejection at the regular general election, to be held on the . . . . . day of . . . . . , A.D., 19 . . . , and each for himself says: I have personally signed this petition; I am a legal voter of the State of Idaho; my residence and postoffice are correctly written after my name.

Name Residence. Postoffice.

(If in a city, street and number.)

(Here follow twenty numbered lines for signatures.)

The petition for referendum on any act passed by the state legislature of the State of Idaho shall be substan-

tially the same form with appropriate title and changes, setting out in full the text of the act of the legislature to be referred to the people for their approval or rejection.

SECTION 67-202:

67-202. Senatorial districts.—Each county in the state now existing or hereafter created shall constitute a senatorial district and shall elect one senator.

SECTION 67-203 AS PRESENTLY ENACTED:

67-203. Representative districts. — The several counties shall elect members of the house of representatives as follows: Each county shall elect one (1) representative for the first five thousand (5,000) population and one (1) additional representative for each additional ten thousand (10,000) population of such county. Population for this purpose shall be determined solely according to the last official United States census; provided that there shall be at least one (1) representative from each county.

SECTION 67-203 AS ENACTED IN 1951:

67-203. Representative districts. — The several counties shall elect members of the house of representatives as follows: Each county shall elect one representative for each * *seventeen* thousand * * * population of such county and remaining fraction thereof amounting to * three thousand population or more. Population for this purpose shall be determined solely according

to the last official United States Census; provided that there shall be at least one representative from each county.

SECTION 67-203 AS ENACTED IN 1941:

67-203. Representative districts. — The several counties shall elect members of the house of representatives as follows: Each county shall elect one representative for each twelve thousand five hundred population of such county and remaining fraction thereof amounting to five thousand population or more. Population for this purpose shall be determined solely according to the last official United States Census; provided that there shall be at least one representative from each county.

SECTION 67-203 AS ENACTED IN 1933:

REPRESENTATIVE DISTRICTS.—The several counties shall elect members of the house of representatives as follows: Each county shall elect one representative for each * * * *ten thousand population of such county* and remaining fraction thereof amounting to * * * *five thousand population or more. Population for this purpose shall be determined solely according to the last official United States Census;* provided, that there shall be at least one representative from each county.

SECTION 67-203 AS ENACTED IN 1917:

The apportionment of the houses of the Legislature is and shall be as follows:

Each county in the State of Idaho and any county which may hereafter be created shall constitute a senatorial district and shall elect one senator.

The several counties shall elect members of the House of Representatives as follows: Each county shall elect one representative for each 2,500 votes and remaining fraction thereof amounting to 1,000 votes or more cast in said county at the last general election, based on the total vote cast for all candidates for Governor: *Provided,* That there shall be at least one representative from each county. It shall be the duty of the Secretary of State to certify to the county auditor of each county on or before the first day of April, 1918, and biennially thereafter the number of representatives in the Legislature said county will be entitled to elect at the following election. When any new counties have been created, subsequent to the last general election for Governor, the total vote cast for Governor in the territory included in any such new county and in the territory remaining in any county or counties from which said new county or counties have been created shall be estimated by the Secretary of State as nearly as possible from the election returns and the legislative apportionment figured thereon.